APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15750

VIRGINIA PETROLEUM JOBBERS ASSOCIATION, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*
BLUE RIDGE GAS COMPANY, *Intervenor*

On Petition for Review of Order
of Federal Power Commission

Decided June 22, 1961

Mr. Bryce Rea, Jr., for petitioner.

Mr. Howard E. Wahrenbrock, Solicitor, Federal Power Commission, with whom *Messrs. John C. Mason*, General Counsel, Federal Power Commission, *Robert L. Russell*, Assistant General Counsel, Federal Power Commission, and *Milton J. Grossman*, Attorney, Federal Power Commission, were on the brief, for respondent. *Messrs. Willard W. Gatchell*, General Counsel, Federal Power Commission, at the time the record was filed, *Edwin J. Reis* and *Peter H. Schiff*, Attorneys, Federal Power Commission, also entered appearances for respondent.

Mr. Donald E. Van Koughnet for intervenor.

Before: WILBUR K. MILLER, *Chief Judge*, and BAZELON and BURGER, *Circuit Judges*.

BURGER, *Circuit Judge*: The Blue Ridge Gas Company, intervenor herein, is a distributor of propane air gas in Harrisonburg, Virginia, and environs. It desires to estab-

lish natural gas service by constructing facilities to connect with an interstate pipeline, Atlantic Seaboard Corporation, a natural gas company certificated under the Natural Gas Act, 15 U.S.C. §§ 717-717w (1958), at a point in Virginia. Having obtained a certificate of convenience and necessity authorizing construction and operation of the project from the State Corporation Commission, Blue Ridge applied to the Federal Power Commission under Section 7(a) of the Natural Gas Act, 15 U.S.C. § 717f(a) (1958), for an order directing Atlantic to sell an appropriate supply of gas to Blue Ridge and to establish physical connection with its facilities. The Virginia Petroleum Jobbers Association, an organization of wholesale and retail petroleum distributors, sought to intervene in the proceeding. When the Commission refused to allow intervention, we reversed and ordered a new hearing at which Jobbers might participate. *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 105 U.S. App. D.C. 172, 265 F. 2d 364 (1959). At the conclusion of the second hearing the examiner recommended that the requested order be granted and the Commission adopted his recommendation. *Blue Ridge Gas Co.*, 23 F.P.C. 245 (1960). The questions presented are:

(1) May the Commission decline to issue a subpoena for expert testimony and for production of reports prepared by an expert witness for private clients?

(2) Is the finding that the grant of the order was in the public interest supported by substantial evidence?

(3) Should the Commission have ordered that the record be reopened to hear evidence of changes in Atlantic's rates?

Although the Commission lacks regulatory jurisdiction over the purely intrastate operation proposed by Blue Ridge, 15 U.S.C. § 717(c) (1958), the application by Blue Ridge for an extension of service from Atlantic placed the feasibility of the project in issue. The Commission

was bound to protect present and potential users of Atlantic's gas supply from the diversion of gas to a project which is not financially feasible, as well as to consider the effect on Atlantic's other rates of the extension of service. See *Minneapolis Gas Co.* v. *FPC*, 108 U.S. App. D.C. 36, 278 F. 2d 870, *cert. denied*, 364 U.S. 891 (1960); *Panhandle Eastern Pipe Line Co.* v. *FPC*, 232 F. 2d 467 (3d Cir.), *cert. denied*, 352 U.S. 891 (1956).

The primary evidence offered by Blue Ridge at the hearing was a study by a professional engineering firm. Petitioner requested that a subpoena *duces tecum* issue to a private engineer for the production of a report on the feasibility of an earlier but similar project which the engineer had made at the behest of the predecessor of Blue Ridge. The examiner held, and the Commission agreed, that the subpoena should not be granted for expert testimony of this nature, in the absence of an agreement by petitioner for appropriate compensation.

Jobbers contends that the Commission should not have considered this factor, because the matter sought was relevant and material and Section 6(c) of the Administrative Procedure Act, 5 U.S.C. § 1005(c) (1958), provides that "agency subpenas . . . shall be issued to any party upon request and . . . upon a statement or showing of general relevance and reasonable scope of the evidence sought."

Whether a subpoena calling for testimony of this nature was of "reasonable scope" is primarily a problem for the Commission. While we have held in a civil case that expert testimony could in some circumstances be compelled by subpoena, *Bradley* v. *Davidson*, 47 App. D.C. 266 (1918), we note that many other courts have taken the contrary view. *E.g.*, *L'Etoile* v. *Director of Pub. Works*, 153 A. 2d 173 (R.I. 1959); *Pennsylvania Co. for Ins. on Lives & Granting Annuities* v. *Philadelphia*, 262 Pa. 439, 105 Atl. 630 (1918). We cannot deny the Commission its choice

between these views on what is essentially a procedural matter, particularly since it is in a better position than the courts to judge the proper method of compensation for the expert testimony which necessarily comprises a substantial portion of the evidence before it. To extend the reach of the *Bradley* case to the administrative process would unduly encroach on matters more appropriate left to the experienced discretion of the agency.

Petitioner also urges that the record does not support the findings that the grant of the application is in the public interest. We find it unnecessary to discuss particular items of evidence whose weight is contested, since we are satisfied that the availability of a sufficient gas supply, the financial feasibility of the project and the need for the service are amply shown in the record.

Finally, petitioner urges that the Commission should have granted its request to reopen the record to show changes in the rate schedules of Atlantic which might affect the feasibility of the project. The situation presented is the classic administrative law problem of the staleness of the record, in this context, because of recurrent rate changes. As the Supreme Court has stated, if the litigants "might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated. . . ." *ICC* v. *Jersey City*, 322 U.S. 503, 514 (1944). This is not a case in which evidence was rejected because of an erroneously narrow view of the scope of inquiry at the hearing. *Cf. Michigan Consol. Gas Co.* v. *FPC*, 108 U.S. App. D.C. 409, 283 F. 2d 204, *cert. denied*, 364 U.S. 913 (1960); *City of Pittsburgh* v. *FPC*, 99 U.S. App. D.C. 113, 237 F. 2d 741 (1956).

Affirmed.

WILBUR K. MILLER, *Chief Judge*, concurring in the result: I agree that the Federal Power Commission properly refused to issue a subpoena duces tecum for an engineering report as to the feasibility of an earlier project similar to that of Blue Ridge. But I think the refusal to issue the subpoena should be sustained, not for the reason given by the Commission and the court, but because the Commission had no jurisdiction to pass on the feasibility of the Blue Ridge project.

The majority's concession that "the Commission lacks regulatory jurisdiction over the purely intrastate operation proposed by Blue Ridge" does not go far enough; for the Commission also lacks judisdiction over the facilities to be used in the operation.[1] It follows, I think, that the economic feasibility of the proposed construction and operation of facilities for the local distribution of gas is a matter to be passed on by the appropriate state agency. It seems to me, therefore, that Section 1(b) of the Natural Gas Act excludes the feasibility of proposed local distribution facilities from the jurisdiction of the Power Commission, and that the subpoena should have been refused on the ground that the engineering report called for by it related to an issue concerning which the Power Commission had no authority.

The majority hold, however, that when Blue Ridge asked the Power Commission to exercise its authority under Section 7(a) of the Natural Gas Act to direct Atlantic to furnish it with gas, it thereby subjected the feasibility of its project to the scrutiny and determination of the Power Commission. In this connection the majority say:

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[1] Section 1(b) of the Natural Gas Act, 52 STAT. 821 (1938), 15 U.S.C. § 717(b), provides that "The provisions of this Act . . . shall not apply . . . to the local distribution of natural gas or to the facilities used for such distribution . . . ."

> "Although the Commission lacks regulatory jurisdiction over the purely intrastate operation proposed by Blue Ridge, 15 U. S. C. § 717(c) (1958), the application by Blue Ridge for an extension of service from Atlantic placed the feasibility of the project in issue. [1] The Commission was bound to protect present and potential users of Atlantic's gas supply from the diversion of gas to a project which is not financially feasible, [2] as well as to consider the effect on Atlantic's other rates of the extension of service. . . ."

For convenient reference, I have numbered the two statements of principle in the last of the quoted sentences. Neither of them supports the proposition set forth in the preceding sentence: "the application by Blue Ridge placed the feasibility of the project in issue." This is demonstrable, I think.

Statement No. 1 in the quoted excerpt from the majority opinion is, of course, true, but it has no application to the present situation. For the Blue Ridge project is not one "which is not financially feasible." The Virginia Commission's certificates of convenience and necessity, to which I shall make further reference, constitute or reflect a finding by that agency, which had undoubted jurisdiction, that the Blue Ridge project is financially feasible.

The question here is not whether the Power Commission "was bound to protect present and potential users of Atlantic's gas supply from the diversion of gas to a project which is not financially feasible." That may be admitted, as I have said. The question is whether Blue Ridge's application for service gave to the Power Commission jurisdiction to pass on the feasibility of its proposed intrastate project, which had already been approved by the state commission having regulatory jurisdiction. If the Power Commission thereby acquired such jurisdic-

tion, it could only be under Section 7(a) of the Natural Gas Act, which is reproduced in the margin.[2]

It will be noted that, under Section 7(a), before the Power Commission may direct a natural gas company to "sell natural gas to, any person . . . legally authorized to engage in . . . local distribution . . .," it must find such action necessary or desirable in the public interest; and must further find that it would not impair the wholesaler's ability to render adequate service to its customers, and would not place an undue burden upon it. Obviously it is in the public interest that gas be furnished to a legally authorized local distributor if it can be done without prejudice to the wholesaler or to customers already attached; so the inquiry is really narrowed to the question whether such prejudice would result.

I suggest that, in addition to making the findings which are statutory prerequisites, the Power Commission must be satisfied, before ordering service, that the applicant

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[2] Section 7(a), 52 STAT. 824 (1938), 15 U.S.C. § 717f(a), is as follows:

> "SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers."

is a "person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public". When it is so satisfied, and when it has made the statutory findings, the Power Commission may order the connection. Significantly, the statute does not direct that it must find the local project feasible; such provision was purposely omitted from Section 7(a), I think, for the reason that a legally authorized project is one which has been found feasible. It is therefore my view that, having found the applicant legally authorized by state authority, the Power Commission need not make, and indeed is not authorized or required to make, an independent investigation concerning the economic feasibility of the applicant's local project.

In this case the Power Commission knew its applicant was legally authorized to engage in local distribution. There was before it a certified copy of the order of the State Corporation Commission of Virginia, dated May 22, 1958, granting to Blue Ridge Gas Company certificates of public convenience and necessity to construct and operate the gas transmission lines and other facilities proposed by it. The Virginia authorization was admitted in evidence by the Examiner of the Federal Power Commission May 11, 1959, and was filed with his certification October 20, 1959. The issuance of those certificates caused Blue Ridge to be a "person . . . legally authorized to engage in the local distribution of natural or artificial gas to the public" within the meaning of Section 7(a). I think, as I have indicated, the state certificates connoted an affirmative finding that the Blue Ridge project was economically feasible, for I am sure that otherwise the certificates would not have been issued.

I turn to consider statement of principle No. 2, in the excerpt from the majority opinion quoted above: "The Commission was bound . . . to consider the effect on Atlantic's other rates of the extension of service." While this is true as a general proposition, it has nothing to

do with the financial feasibility of the applicant's local project; instead, it goes to the question whether on the whole the connection would be in the public interest.

Even if an adverse effect on Atlantic's other rates were germane to the question whether the Power Commission has jurisdiction to determine the feasibility of the local project, it would have no bearing here because the proposed connection could have no such effect. The Blue Ridge proposal did not make necessary an "extension of service" by Atlantic, if that term is used to mean an extension of facilities, for Blue Ridge is to build a line to connect its system with Atlantic's pipeline. The only investment required of Atlantic is the trifling cost of a physical connection with its line, which will have no impact whatever on Atlantic's rates.

I consider it immaterial that the Power Commission did not rely on lack of jurisdiction of the feasibility question as a reason for refusing to issue a subpoena duces tecum, for it seems to me that the *Chenery* rule[3] does not apply when a jurisdictional question is presented. The mere fact that the Commission exercised jurisdiction does not preclude us from considering the question whether such jurisdiction existed. The question of jurisdiction lies at the threshold of every inquiry by a court or a commission. Without it, no valid action can be taken.

The majority's disposition of the subpoena question is a holding that the Power Commission had jurisdiction, in the circumstances here, to make its own determination of the feasibility of the Blue Ridge project. This is an erroneous holding, with which I am unwilling to agree. Otherwise, I concur in the reasoning of the majority opinion, and I join in the affirmance of the Power Commission's order.

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[3] S. E. C. v. Chenery Corp., 318 U. S. 80 (1943); S. E. C. v. Chenery Corp., 332 U. S. 194 (1947).

RESPONDENT'S BRIEF IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1961

VIRGINIA PETROLEUM JOBBERS ASSOCIATION, *Petitioner*

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The order of the Federal Power Commission (R. 172)[1] denying petitioner's application for a subpena *duces tecum*, is reported at 21 F.P.C. 901. The opinion of the court of appeals (Pet. 1a-9a), affirming the order, is not yet reported.

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[1] "R." refers to the Joint Appendix containing the portions of the record which were reproduced in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1961. The petition for a writ of certiorari was filed on September 20, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Power Commission properly exercised its discretion in refusing petitioner's request to compel an expert witness to testify for a lay witness' compensation, where petitioner had not shown any inability to arrange for the voluntary attendance of the witness and to compensate him as an expert witness.

STATUTES AND RULE INVOLVED

Section 6(c) of the Administrative Procedure Act, 5 U.S.C. 1005(c), provides:

> **Subpenas and production of evidence.**—Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

The Natural Gas Act provides in pertinent part:

Section 14(c), 15 U.S.C. 717m(c):

> For the purpose of any investigation or any other proceeding under this Act, any member of

the Commission, or any officer designated by it, is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which the Commission finds relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any designated place of hearing. Witnesses summoned by the Commission to appear before it shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

Section 15(b), 15 U.S.C. 717n(b):

All hearings, investigations, and proceedings under this Act shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this Act.

Section 1.23 of the Rules of Practice and Procedure of the Federal Power Commission, 18 C.F.R. 1.23, provides:

Subpenas. (a). *Issuance.* Subpenas for the attendance of witnesses or for the production of documentary evidence, unless directed by the Commission upon its own motion, will issue only upon application in writing to the Commission or the presiding officer, except that during sessions of a hearing in a proceeding, such application may be made orally on the record before the Commission or presiding officer, who is hereby given the

authority to determine the relevancy and materiality of the evidence sought and to issue such subpenas in accordance with such determination. Such written applications shall be verified and shall specify as nearly as may be the general relevance, materiality, and scope of the testimony or documentary evidence sought, including, as to documentary evidence, specification as nearly as may be, of the documents desired and the facts to be proved by them in sufficient detail to indicate the materiality and relevance of such documents.

* * * * *

STATEMENT

The Blue Ridge Gas Company, a distributor of propane gas, applied to the Federal Power Commission for an order under Section 7(a) of the Natural Gas Act, 15 U.S.C. 717f(a), directing the Atlantic Seaboard Corporation, a natural gas pipeline, to establish physical connection with Blue Ridge's facilities and to sell Blue Ridge natural gas for resale and distribution in Harrisonburg, Virginia, and its environs. Petitioner, an organization of wholesale and retail petroleum distributors, intervened in opposition to Blue Ridge's application.[2]

At the hearing, Blue Ridge introduced in evidence the study of a professional engineering firm which supported the economic feasibility of the project (R. 8-14, 22, 90-94). During the course of the hearing, petitioner requested that a subpena *duces*

[2] The Commission originally refused to allow the intervention and granted Blue Ridge's application. The Court of Appeals for the District of Columbia Circuit reversed and ordered a hearing *de novo* in which petitioner was permitted to intervene. *Virginia Petroleum Jobbers Association* v. *Federal Power Commission*, 265 F. 2d 364 (C.A.D.C.).

tecum issue to an engineer employed by another professional engineering firm which had made an earlier study and report on the feasibility of an allegedly similar project at the behest of Blue Ridge, when it was under a different ownership (R. 163-166).[3] Petitioner alleged that the earlier study and report had concluded that the project was not economically feasible. The Hearing Examiner ruled "that a subpoena should not issue for the attendance of the said [expert witness] Lockwood at the hearing, when he would thereby be compelled to testify as an expert witness at a lay witness' fee of $4.00 per day. Instead, the intervenor should arrange for compensation to be paid to him as an expert witness, and for his voluntary attendance at the hearing" (R. 167-168). The Commission upheld the Examiner's ruling, expressly not passing on the relevance or materiality of the evidence sought to be adduced (R. 172).[4] The court of appeals affirmed (Pet. 1a-4a) the Commission's ruling denying the subpena, as well as the Commission's order (R. 197-202) granting the application of Blue Ridge.

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[3] The private engineer, a Mr. Lockwood, lived in Connecticut. Petitioner's application for the subpena acknowledged that, if granted, the subpena would have required Mr. Lockwood to travel from Connecticut to Washington, D. C., for at least a two-day period. For compensation, petitioner tendered "a witness fee of $4.00 per day for two days, expenses of $8.00 per day for two days, and mileage of eight cents per mile for the round trip from Norwalk, Connecticut to Washington, D. C." (R. 164). With respect to compensation for an expert witness, see 28 U.S.C. 1821; 28 C.F.R. 21.2.

[4] The record does not show that, subsequent to the denial of the application by the hearing officer, petitioner made any attempt to secure the voluntary appearance of the expert witness, and there was no showing that the witness was not willing to appear voluntarily.

ARGUMENT

Further review by this Court of the narrow question presented here is not warranted. The court below was clearly correct in holding that the Commission properly exercised its discretion in refusing to issue a subpena. No question of general importance is raised by petitioner. Nor is there a conflict in decisions.

1. Neither the Hearing Examiner, the Commission, nor the court of appeals held, as petitioner asserts (Pet. 14, 18), that under no circumstances could subpenas issue to expert witnesses.[5] Rather, the court held (Pet. 3a-4a) that, since the Commission is in a better position to judge the proper method of compensation of expert witnesses, the Commission properly exercised its "experienced discretion" in determining whether to subpena an expert witness in circumstances in which no attempt had been made to obtain the voluntary appearance of the witness.

Certainly no contention can be made that the Commission acted unreasonably in declining to force the expert to testify at the same compensation accorded a lay witness,[6] and, in fact, petitioner does not so contend. Instead, petitioner argues that Section 6(*c*) of the Administrative Procedure Act, 5 U.S.C. 1005(*c*),

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[5] In addition, contrary to petitioner's statement (Pet. 6, 7), neither the Examiner nor the Commission found that the proffered evidence was relevant and material. Rather, they found it unnecessary to reach this question (R. 167, 172) since they determined that a subpena should not issue for other reasons.

[6] The hardship that might be imposed on a witness by compelling his attendance is exemplified by the present case. See footnote 3, *supra*, p. 5. Two hearings were held; the second commenced on May 11, 1959, continued intermittently for a period of 16 hearing days, and concluded on July 17, 1959 (R. 174).

supra, p. 2, must be read as conferring upon a party requesting a subpena an *absolute* right to its issuance, so long as the evidence sought is relevant and material. But if petitioner's position were to be accepted, the Commission would not be able to refuse a subpena even though it plainly appeared that the evidence sought to be adduced would have to be excluded at the hearing because it was, for example, unsubstantiated hearsay or required the breach of a confidential relationship.

Moreover, the excerpt from the Senate Judiciary Committee Report, relied on by petitioner (Pet. 10-11), does not in any way justify petitioner's interpretation of Section 6(*c*) of the Administrative Procedure Act. What the Committee was obviously suggesting was that an agency should not discriminate between private parties and the agency's staff *in granting or denying* subpenas. It was not suggesting that the agency was to be precluded from establishing reasonable restrictions on the use of subpenas.

The requirements of "general relevance and reasonable scope" imposed by Section 6(*c*) are not inconsistent with the Commission's interpretation of Section 6(*c*). In prescribing these requirements, Congress was endeavoring to remedy a specific evil that it had detected in the practice of some administrative agencies. As the Senate Judiciary Committee stated in its report, S. Rep. No. 752, 79th Cong., 1st Sess., p. 20:

> This provision [Section 6(*c*)] will assure private parties the same access to subpenas as that available to the representatives of agencies. It will also prevent the issuance of improvident subpenas or action by an agency requiring a de-

> tailed, unnecessary, and burdensome showing of evidence which might fall into the hands of the party's adversaries or investigators and prosecutors (who in any event should not have access to such papers directly or indirectly).

2. Petitioner also seems to contend (Pet. 16) that, because some courts have held that experts should be compelled to testify in judicial proceedings, *a fortiori* the same rule should have been applied by the Commission here. Conceding, as did the court below, that the rule urged by the petitioner is controlling in a civil action in the District Court for the District of Columbia under *Bradley* v. *Davidson*, 47 App. D.C. 266, (Pet. 3a), nevertheless, many other courts have taken the view espoused by the Commission. *E.g., People ex rel. Kraushaar Bros.* v. *Thorpe*, 296 N.Y. 223, 72 N.E. 2d 165; *L'Etoile* v. *Director of Public Works*, 153 A. 2d 173 (R.I.); *Pennsylvania Co. for Insurances on Lives & Granting Annuities* v. *Philadelphia*, 262 Pa. 439, 105 Atl. 630. These decisions evidence the reasonableness of the Commission's ruling. As the court of appeals stated (Pet. 3a-4a):

> We cannot deny the Commission its choice between these views on what is essentially a procedural matter * * *. To extend the reach of the *Bradley* case to the administrative process would unduly encroach on matters more appropriate[ly] left to the experienced discretion of the agency.

3. Finally, whatever error might have resulted from the Commission's refusal to issue the subpena was at most harmless. Not only was the evidence of

"economic feasibility" on which the Commission granted Blue Ridge's application sufficient, but it was also highly reliable. As the Hearing Examiner found (R. 180):

> The engineer who made the estimates has had broad experience in forecasting sales revenues from distribution projects. He stated that in his opinion the estimates were "reasonable and possibly conservative." Finally, the engineering report is that of a firm of excellent reputation.

Moreover, petitioner's failure to make any attempt to secure Mr. Lockwood's voluntary appearance (see footnote 4, *supra*, p. 5), either before or after its application for the subpena, indicates that petitioner hardly attached much importance to the proposed and allegedly conflicting testimony. Whatever prejudice the petitioner may have suffered as a result of the lack of Mr. Lockwood's testimony is attributable to petitioner's own inaction. Petitioner therefore cannot now be heard to complain.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1961.